

Elmer R. Baumgardner t/a Baumgardner Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 32, AFL-CIO. Cases 6-CA-19251 and 6-CA-19564

March 30, 1990

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On May 12, 1988, the National Labor Relations Board issued a Decision and Order¹ in which the Board, *inter alia*, ordered the Respondent, Elmer R. Baumgardner t/a Baumgardner Company, to make whole Marvin Welsh Jr. for any loss of pay he may have suffered as a result of the Respondent's unfair labor practices against him in violation of Section 8(a)(3) and (1) of the Act. On December 28, 1988, the United States Court of Appeals for the Third Circuit entered a judgment enforcing the Board's Order.² A controversy having arisen over the amount of backpay due under the Board's Decision and Order, the Regional Director for Region 6 issued a backpay specification and notice of hearing alleging the amount of backpay due the discriminatee and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations.

The Respondent thereafter filed an answer to the backpay specification. The answer contained general denials and alleged that Welsh was not entitled to backpay because the job for which he was hired was eliminated on June 27, 1986. The answer admitted that Welsh's rate of pay prior to June 27, 1986, was \$5.20 per hour but denied that Welsh would have received the pay raises alleged in the specification that were based on the pay raises of representative welding employees.³ The answer alleged that the representative welding employees employed by the Respondent possessed work qualifications "substantially in excess of those possessed by discriminatee Welsh" and that such increases "would not have been provided to discriminatee Welsh had he continued in the employ of respondent." Paragraph 8(c) of the answer also demanded proof for Welsh's interim earnings.

¹ 288 NLRB 977.

² Unpublished.

³ To measure the backpay due, the backpay specification used the pay increases of representative welding employees employed by the Respondent since the time of Welsh's discharge. The specification then computed Welsh's backpay on the basis of his wage rate immediately prior to the Respondent's unfair labor practices, and the subsequent pay raises of the representative welding employees.

On August 17, 1989, the General Counsel filed with the Board a Motion to Strike or, in the Alternative, Motion for Summary Judgment. The General Counsel alleged that the motion to strike should be granted because the answer failed to meet the requirements of Section 102.56(a) as it was neither signed nor sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed. In the alternative, the General Counsel alleged that summary judgment should be granted because: (1) the Respondent's affirmative defense that discriminatee Welsh's job was terminated on June 27, 1986, had already been litigated; and (2) the Respondent's argument that Welsh would not have received the same wage increases as the representative welders failed to set forth in sufficient detail the Respondent's position and lacked appropriate supporting figures as required by Section 102.56(b). Accordingly, the General Counsel requested that all paragraphs of the answer be admitted as true.

On August 21, 1989, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the General Counsel's Motion to Strike or, in the Alternative, Summary Judgment should not be granted. The Respondent filed an amended answer⁴ on September 5, 1989, and a response to the General Counsel's Motion to Strike or, in the Alternative, Motion for Summary Judgment. On September 20, 1989, the General Counsel filed a response to the Respondent's amended answer.⁵

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board makes the following

⁴ The amended answer was signed and sworn to by the Respondent. The amended answer denied that Welsh would have received the same pay raises as the representative welders because the welders allegedly possessed qualifications "substantially in excess of those possessed by Welsh . . ." The answer alleged that Welsh was incapable of obtaining these qualifications because of his "minimal training and educational background." The Respondent further alleged that it would be inappropriate to calculate the number of hours that Welsh would have worked by considering the representative welders because Welsh "was not capable of doing all forms of welding, both gas and electric, and was incapable of reading blueprints, architectural plans, schematic drawings and other technical documentation." The amended answer also continued to demand proof for Welsh's interim earnings.

⁵ The General Counsel alleged that a motion to strike should be granted because the Respondent did not provide an "original" amended answer and four copies as required by Sec 102.56(a) of the Board's Rules and Regulations. In the alternative, the General Counsel alleged that the Motion for Summary Judgment should be granted because the amended answer did not raise any valid defense to the backpay specification. The General Counsel argued that par 8(c) of the amended answer regarding Welsh's interim earnings demanded proof without elaboration and thus failed to comply with the specificity requirements of Sec. 102.56(b).

Ruling on the Motion to Strike, or in the Alternative, Motion for Summary Judgment

Section 102.56(a) of the National Labor Relations Board Rules and Regulations requires that an original and four copies of an answer must be filed with the Regional Director who issued the backpay specification within 21 days from the service of the specification. The answer must also be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent. The General Counsel first alleged that the Respondent's answer failed to comply with Section 102.56(a) because the answer had not been signed and sworn to by the Respondent or by a duly authorized agent. The Respondent filed an amended answer that was properly signed and sworn to by the Respondent. We find, therefore, that the procedural defect of the Respondent's answer was cured by the amended answer. The General Counsel next alleged that the amended answer failed to comply with Section 102.56(a) because the Respondent had not provided an "original" signed by the Respondent or an authorized agent⁶ and had not provided four copies of the amended answer. The General Counsel therefore asserted that the Respondent's amended answer should be stricken and that all paragraphs of the backpay specification should be admitted as true.

The Board has recently stated that a pleading that substantially fails to conform to the Board's procedural rules will normally be stricken in its entirety. *Scotch & Sirloin Restaurant*, 287 NLRB 1318 fn. 5 (1988). Although the amended answer is a copy of the original and the Respondent failed to provide the requisite number of copies, the amended answer does set forth all the information and signatures required by Section 102.56(a). We thus find that the amended answer substantially conformed to the Board's procedural rules.⁷ Accordingly, we deny the General Counsel's motion to strike the answer in its entirety.

Section 102.56(b) and (c) of the Board's Rules and Regulations states, in pertinent part:⁸

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specifi-

cation, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. . . . As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*— . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

We agree with the General Counsel that the Respondent's amended answer to the backpay specification is substantively deficient, except with regard to the wage increase allegations in paragraph 8(a), the gross backpay amounts set forth in paragraph 8(b) in the event merit is found to the Respondent's contentions regarding the wage allegations in paragraph 8(a), and Welsh's interim earnings in paragraph 8(c) of the specification.

Section 102.56(b) mandates that a respondent's answer concerning all matters within its knowledge, including the various factors entering into the computation of gross backpay, be specifically drawn and that a general denial about those matters does not suffice. Although the Respondent disputes the number of hours Welsh would have worked, it does not set forth alternatives with supporting figures. Its failure to deny the specification as prescribed by Section 102.56(b), or to explain adequately its failure to do so, requires that those allegations of the specification be deemed admitted to be true under Section 102.56(c). We also reject the Respondent's argument that Welsh is not entitled to backpay because the job for which he was hired was eliminated, as this issue has already been

⁶ The amended answer that the Respondent filed was a copy of the original.

⁷ Cf. *Contractors Excavating*, 270 NLRB 1189, 1190 (1984), in which the Board granted a motion to strike the respondent's unsigned and undated answer.

⁸ Formerly Sec. 102.54. The Board amended its Rules governing proceedings concerning compliance with Agency orders effective November 13, 1988. The substance of former Secs. 102.54 and 102.55 has been incorporated into Sec. 102.56 as revised; and former Sec. 102.56, with some modification, has become the new Sec. 102.57, while the substance of former Sec. 102.57 has become par. (c) of the new Sec. 102.55, in the revised Rules.

litigated in the underlying unfair labor practice case.⁹ The Respondent is barred from raising such a defense at the compliance stage of the case. See *Overseas Motors*, 277 NLRB 552, 554 (1985), remanded on other grounds 818 F.2d 517 (6th Cir. 1987). Accordingly, the Board finds all allegations, except for the allegations concerning the wage increases and interim earnings discussed below, to be true and grants the General Counsel's Motion for Summary Judgment with respect to these allegations.

The General Counsel is seeking summary judgment regarding the calculation of Welsh's pay raises. The Respondent's answer and amended answer alleged that Welsh would not have enjoyed the same wage increases as the representative welders because Welsh did not possess their qualifications. The Respondent's answers suggest that Welsh would have continued to earn \$5.20 per hour throughout the entire backpay period with no pay increases. Although the Respondent's answer and amended answer did not set forth in detail alternative backpay calculations, the Respondent has set forth an appropriate supporting figure (the \$5.20 per hour that Welsh was earning prior to the Respondent's unfair labor practices), as required by Section 102.56(b). We therefore find that the Respondent's denials concerning Welsh's pay increases are sufficient to require a hearing on that issue.

The General Counsel is also seeking summary judgment regarding Welsh's interim earnings. The

Respondent's answer and amended answer demanded proof of Welsh's interim earnings. The Board has held that a general denial is sufficient to place interim earnings into issue as that information is generally not within the knowledge of the Respondent. *Dews Construction Corp.*, 246 NLRB 945 (1979). We consider the Respondent's answers to be a sufficient general denial of paragraph 8(c) of the specification that sets out Welsh's interim earnings. Accordingly, we find that the Respondent's denial concerning Welsh's interim earnings is sufficient to require a hearing on that issue.

ORDER

It is ordered that the General Counsel's motion to strike is denied and that the General Counsel's Motion for Summary Judgment be granted with respect to all allegations in the backpay specification, except the issues of Welsh's pay increases and interim earnings.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 6 for the purposes of issuing a notice of hearing and scheduling the hearing before an administrative law judge, which shall be limited to taking evidence concerning the pay increases and interim earnings of Marvin Welsh Jr.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

⁹ In 288 NLRB 977 (1988), the Board rejected the Respondent's argument that Welsh's job had been eliminated and found that the Respondent unlawfully discharged Welsh.